United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 9, 2005

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: UGSOA (Akal Security) 133-5000
Cases 8-CB-10233, 9-CB-11235, 554-1483-0100
10-CB-8201, 13-CB-17925, 14-CB-9930, 554-1483-0150-5000
16-CD-6822, 16-CB-6823, 33-CB-4053

These cases were submitted for Advice on whether the Union violated Section 8(b)(3) by requesting substantial wage variance hearings from the Department of Labor after the parties had entered into collective-bargaining agreements that specified wages and benefits. We find no violation because the Union did not attempt to unilaterally modify the agreements. Rather, by seeking a determination that the Service Contract Act (SCA) required the Employer to pay a higher wage rate than specified in the agreements, the Union sought determinations that the agreements did not control wages. Because the DOL provides for such determinations, the Union engaged in conduct protected under both Section 7 and the First Amendment.

FACTS

Since 1999, the Employer, Akal, has contracted with the federal government to provide U.S. marshal services in several locations, including Sherman, Tyler, and Plano Texas; Austin, Texas; Cleveland, Akron, and Canton, Ohio; the Southern District of Illinois; Gary and Hammond, Indiana; and Cincinnati, Ohio. The United Government Security Officers of America (UGSOA) has represented the employees, and the parties have negotiated several collective-bargaining agreements for these locations.

As a private contractor providing services to a federal agency, the Employer is covered by the Service Contract Act (SCA). The SCA provides that every contract entered into by the U.S. and an Employer shall specify a minimum monetary wage, which shall be either the prevailing wage rate issued by the DOL in that locality,[1] or, where a

[1] The Wage and Hour Division determines the prevailing wage rates for various job classifications in specified localities throughout the country and periodically publishes wage determinations that establish the minimum wages to be

collective-bargaining agreement covers employees, in accordance with the rate for such employees.[2] Section 353(c) of the SCA provides that a successor employer cannot pay wages and benefits less than those contained in a predecessor collective-bargaining agreement.[3] Section 353(c) also contains a proviso, which excuses the obligation to pay the wages and benefits found in the predecessor collective-bargaining agreement if the Secretary finds after a hearing that the wages and benefits found in the predecessor's collective-bargaining agreement "are substantially at variance with those which prevail for services of a character similar in the locality."

In 2001, the Union requested substantial variance hearings, claiming that the collective-bargaining agreements' wages were substantially lower than the DOL prevailing wage rates and should be upwardly adjusted. DOL Administrator William Gross denied that request, ruling that under a 1989 Fourth Circuit decision,[4] substantial variance proceedings may only be utilized if the collectively bargained wages are higher than the prevailing wages. The Union appealed that decision. While the appeal was pending, the Union and the Employer negotiated new collective-bargaining agreements that contained wages higher than the prevailing wage determinations.

In September 2003, the DOL's Administrative Review Board (ARB) reversed Administrator Gross' determination. The ARB noted that, contrary to the Fourth Circuit's decision in Gracey, DOL's longstanding policy was to grant substantial variance hearings when the collectively bargained wages were substantially below the prevailing wage determinations.[5] Finding that the Administrator's

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paid under service contracts entered into in the applicable job locality.

[2] 41 U.S.C. Sec. 351.

[3] Under the SCA, a predecessor is the prior service contractor and a successor is the service contractor who obtains the contract to perform substantially the same work. A service contractor can thus be its own predecessor and successor under succeeding service contracts. See 29 C.F.R. Sec. 4.163(e).

[4] Gracey v. International Brotherhood of Electrical Workers, Local Union 1340, 868 F.2d 671, 677 (4th Cir. 1989).

[5] UGSOA (Akal), ARB No. 02-012, 2003 WL 22312701 (ARB Sept. 29, 2003).

ruling did not comport with the statute's plain meaning or case law, the ARB reversed and vacated Gross' decision. The Union, however, did not pursue a substantial variance hearing on remand because it had already negotiated new collective-bargaining agreements containing wages greater than DOL's prevailing wage.

In the summer of 2004, the parties again negotiated new collective-bargaining agreements. After the parties had negotiated the agreements, DOL issued new prevailing wage determinations that were higher than the collectively bargained wages.

The Union requested that the Employer increase the contractual wages to the prevailing wage rates. The Employer refused. In September 2004, the Union again requested substantial variance hearings. In early November 2004, the Employer filed these charges, arguing that by requesting the hearings, the Union was attempting to modify the collectively bargained wages and circumvent the bargaining process. In February 2005, the DOL denied the Union's request for substantial variance hearings.

ACTION

We conclude that the charges should be dismissed, absent withdrawal, because the Union did not attempt to unilaterally modify the collective bargaining agreements midterm. Rather, the Union petitioned the DOL for relief from its contractual wage obligations. Because the SCA provides for such relief, the Union's petitioning was not unlawful and was protected under Section 7 and the First Amendment.

A union violates Section 8(b)(3) by unilaterally modifying or attempting to modify a collective-bargaining agreement midterm.[6] We first note that, by petitioning the

[6] See, e.g., District Council of Iron Workers of California (J.W. Reinforcing Steel), 317 NLRB 817, 823 (1995) (by advising employer that it would not dispatch any employees to certain jobsites unless employer agreed to execute statewide contract, union attempted to compel employer to agree to midterm modification in violation of 8(b)(3)); Southern California Pipe Trades District Council No. 16 (Plumbing Industry), 292 NLRB 270, 270 (1989) (union violated 8(b)(3) by soliciting member employers of multi-employer association to abandon multi-employer bargaining at untimely time and to adopt certain midterm contract modifications); United Marine Div. Local 333, 226 NLRB 1214, 1214 (1976) (union's insistence on change of working conditions of employees backed by threat to enforce demand

DOL, the Union did not attempt to unilaterally modify the agreement. Rather, it petitioned the DOL for a determination that the contractual wage rate was inapplicable – essentially seeking relief from, not modification of, its contractual wages. The SCA sets the minimum wage to be paid to service contractor employees, utilizing either the prevailing wage or, where one exists, the collective bargaining agreement.[7] The substantial variance proviso offers a safeguard for union-represented employees and the public by providing that where collectively-bargained wages and benefits are substantially higher or substantially lower than the prevailing wage rate, the collective bargaining agreement does not control.[8] By invoking this proviso, the Union was thus not attempting to unilaterally modify the wages under its agreements; rather, it was asking the DOL to set a higher minimum wage, essentially providing the Union with federally-available relief from its contractual wage obligations.[9]

Second, we note that the Union's petitioning here was lawful under and contemplated by the SCA. While the Union's petition was ultimately unsuccessful, the ARB's 2003 decision, reversing Administrator Gross, indicates that SCA substantial variance proceedings may be available where the collectively bargained wage rate is lower than the prevailing wage rate and where the parties are midterm in a collective-bargaining agreement.[10] As the DOL is charged with interpreting the SCA, we defer to its interpretation. The Union did not violate its bargaining obligation because lawful petitioning under an applicable provision of another federal statute should not constitute a violatin of the Act.[11]

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with work stoppages, was an unlawful attempt to unilaterally change and modify employees' working conditions midcontract).

[7] Dynaelectron Corp., 286 NLRB 302, 302-04 (1987).

[8] NASA (Dryden Flight Research Center), SCA-CBV-20-A (August 24, 1979), citing Senate Report No. 92-1131, 92d Congress, 2d. Sess., at pp. 6-7.

[9] We note that the Employer could have also participated in the DOL proceedings and argued against the Union's petition.

[10] UGSOA (Akal), ARB 02-012, 2003 WL 22312701 (ARB Sept. 29, 2003), at p. 8.

[11] See Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942) (Board law should be construed so as to accommodate the

Third, the Union's activity was protected by Section 7 and by the First Amendment. Section 7 includes the right to appeal to administrative and judicial forums to improve employees' working conditions, including minimum wages.[12] The Union's petitioning of the DOL is also encompassed within the First Amendment right to petition the government, including federal agencies, for redress of grievances.[13]

Finally, we note that the Union's petitioning did not have an illegal object under footnote 5 of Bill Johnson's.[14] In footnote 5, the Supreme Court noted that the Board may enjoin suits, regardless of merit, that have an "objective that is illegal under federal law." A lawsuit or an arbitration demand has an illegal objective only if the grant of relief under that suit or demand would be contrary to federal law.[15] Here, if the DOL had granted the Union's requested relief, the DOL would have lawfully established a new minimum wage for this service contractor. It is well settled that payment of a federally mandated wage does not unlawfully modify a collective-bargaining agreement.[16]

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statutory scheme of another administrative body, without excessive emphasis upon the immediate task at hand).

[12] See Eastex v. NLRB, 437 U.S. 556, 565-66 (1978) (union newsletter criticizing president's veto of bill to increase minimum wage was protected by Section 7).

[13] See Petrochem Insulation, 330 NLRB 47, 50 (1999) (right to petition a governmental body falls squarely under umbrella of political expression); Ray Angelini, Inc., 334 NLRB 425, 432 (2001) (union's complaints to city about award of contract to employer with history of wage violations was within its First Amendment right to petition); see also NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979) (NLRA should be construed so as to avoid the curtailment of First Amendment rights whenever possible).

[14] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 737 fn. 5 (1983).

[15] See Teamsters Local 705 (Emery Air Freight), 278 NLRB 1303, 1304-05 (1986) (union's filing grievance had illegal object where union had unlawful secondary object and where grant of relief would have constituted 8(e) violation), enf. denied and remanded in part, 820 F.2d 448 (D.C. Cir. 1987).

[16] See Standard Candy Co., 147 NLRB 1070 (1964).

Accordingly, the Union's petition did not seek an illegal object under footnote 5.

In sum, because the Union's conduct did not constitute an attempt to unilaterally modify the parties' bargaining agreements, the Regions should dismiss the charges, absent withdrawal.

B.J.K.